

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 July 2022

**Public Authority:** Equality and Human Rights Commission

**Address:** Arndale House  
The Arndale Centre  
Manchester  
M4 3AQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information in relation to the Equality and Human Rights Commission's ("EHRC") report into allegation of antisemitism in the Labour Party. The EHRC stated some information was not held and withheld the remaining information under section 44 of the FOIA.
2. The Commissioner's decision is that the EHRC was correct in stating the information at parts 1 and 2 of the request was not held and it has complied with its obligations under section 1 of the FOIA. For parts 3, 4, 5, 7 and 8 the Commissioner upholds the application of section 44 of the FOIA and finds that this provides the EHRC with a basis for withholding the requested information.

#### **Request and response**

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3. On 7 April 2021 the EHRC received a request from the complainant for information in the following terms:

"Questions on the EHRC 'Investigation into antisemitism in the Labour Party. The first set of queries concerns the case of Ken Livingstone and relate to the two interviews, in April 2016, in which he defended Naz Shah against the charge that two of her social media posts were anti-Semitic (Report:: 105) With respect to these interviews the Report (106) refers to a letter from the Jewish Labour Movement (of 15th February 2017). The Report (106, my emphasis) states that the letter

'set out the effect of Ken Livingstone's comments...on the Jewish community' including that they caused 'immeasurable damage'. I have the following questions regarding this characterisation of the letter from the Jewish Labour Movement:

1. Your use of the formulation 'set out the effect' of Ken Livingstone's comments suggests that you are treating this letter not as a submission by a particular organisation but rather as unequivocal evidence of a factual situation ('the effect' etc), is this what you intended or was there a drafting error here?
2. As you are aware the issue of 'antisemitism' in the Labour Party is a divisive one not only within the Party but also amongst different Jewish groups affiliated to the Party and, in particular Jewish Voice for Labour (which submitted evidence to the EHRC, Report: 5 ) has a radically different view of the issue to the Jewish Labour Movement, would you regard Jewish Voice for Labour as not part of 'the Jewish Community'? The Report (106) refers to 'Labour members' who told the EHRC 'that Ken Livingstone's comments caused shock and anger among Jewish Labour Party members who felt they were appalling...and made them feel uncomfortable and unwanted in the Labour Party'.
3. Was this a joint submission of evidence by 'Labour members' or are you referring to a number of individual submissions?
4. How many 'Labour members' are being referred to here?
5. I assume we must take this literally as 'hearsay' i.e. presumably non Jewish Labour members are reporting their perception of the impact of Ken Livingstone's statements on Jewish members. Why did the EHRC not directly obtain evidence from the Jewish members themselves? The Report goes on to say that 'They' 'told us that they thought Ken Livingstone's statement that scrutiny of Naz Shah's conduct was an apparent smear campaign by the 'Israel lobby' was a classic antisemitic trope' (106).
6. Does the reference to 'they' here suggest that this is the same group or set of individuals referred to in questions 4 and 5? The second set of queries refers to the case of Pam Bromley's social media posts. The Report (109) refers to the Labour Party having 'received a number of complaints about Pam Bromley's conduct'. It also cites (109) 'Labour Party members who 'told us that Pam Bromley's conduct...contributed to a hostile environment in the Labour Party for Jewish and non-Jewish members'.
7. Could you indicate the number of complaints referred to here?

8. With respect to the 'Labour Party members' again are we referring to a joint submission or individual submissions and how many individuals are being referred to here?"
4. The EHRC responded on 27 April 2021. It stated no recorded information was held in relation to parts 1 and 2 of the request. For the remaining parts of the request the EHRC stated information was held but was exempt under section 44 of the FOIA by virtue of section 6 of the Equality Act 2006.
  5. The complainant requested an internal review on 12 May 2021. With regard to parts 1 and 2 of the request they argued the questions could be put to individuals within the EHRC who were involved in drafting the report and the information could therefore be accessed within the EHRC. With regard to the remaining parts of the request the complainant asserted that section 6(3) of the Equality Act 2006 was relevant as it authorised disclosures where the information is provided in a manner that ensures no person can be identified.
  6. The EHRC conducted an internal review and responded on 28 May 2021. For parts 1 and 2 the EHRC reiterated no recorded information was held that answered these questions. For the other parts of the request the EHRC maintained section 6 of the Equality Act 2006 prohibited disclosure and the 'gateway' at section 6(3) did not require information to be disclosed.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 22 June 2021 to complain about the way their request for information had been handled.
8. During the course of the Commissioner's investigation the EHRC disclosed the information it held for part 6 of the request.
9. The Commissioner therefore considers the scope of his investigation to be to determine if the EHRC has correctly stated that no information is held in relation to parts 1 and 2 of the request and if the EHRC has correctly refused to provide the information at parts 3, 4, 5, 7 and 8 on the basis of section 44 of the FOIA.

### **Reasons for decision**

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## Section 1 – information held

10. Section 1 of the FOIA states that:

*"Any person making a request for information to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him."*

11. In this case, the complaint disputes the EHRC's position that it does not hold this information. The complainant further argues that the focus of the first two questions in his request was to understand how the EHRC Report was drafted and the conceptual framework underlying the drafting. They consider that as the questions refer to issues involved in drafting this must have involved discussion via email exchanges or discussions of draft versions of the reports. The complainant argues that even if the information is no longer held questions can still be put to individuals in the EHRC who were responsible for drafting the relevant sections of the Report.
12. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the public authority held information relevant to the complainant's request at the time that the request was received.
13. The request relates to the EHRC's investigation under section 20 of the Equality Act 2006 (EA2006) into allegations of anti-Semitism within the Labour Party and the report which was published following the investigation.
14. The EHRC has explained that on receipt of the request it conducted internal enquiries with the relevant team that were involved in the investigation and would hold key information relevant to the request; asking them to identify whether information was held and, where it was, whether it could be disclosed.
15. Following the Commissioner's enquiries the EHRC has looked at this matter again. Turning first to part 1 of the request:

- "Your use of the formulation 'set out the effect' of Ken Livingstone's comments suggests that you are treating this letter not as a submission by a particular organisation but rather as unequivocal evidence of a factual situation ('the effect' etc), is this what you intended or was there a drafting error here?"
16. The EHRC maintains that at the time of the request it did not hold any information in relation to whether or not there was a 'drafting error'. The EHRC has pointed out that it is not required to create information to answer a request so was not obliged to put this question to individuals to ask them to answer the question.
  17. The EHRC has subsequently had confirmation from its Investigation Team that this was not a 'drafting error' as the letter referred to in page 106 of the Report was used by the EHRC to understand how comments made by Ken Livingstone and others were being perceived by those who prepared the letter. The letter was used to understand the 'effect' of the comments made so the use of the terminology 'set out the effect' was not an error. The EHRC does not consider the letter itself to be in the scope of this part of the request.
  18. The Commissioner acknowledges that the complainant's intention was to identify information that would shed some light on the drafting process for the report. However, part 1 of the request is objectively quite narrow – it asks simply if the use of a phrase was a drafting error. The answer being that it was not. The EHRC has explained that any information on this issue was created after the request was made i.e. when the question was put to the Investigation Team following the opening of the Commissioner's investigation. As such it would not be in the scope of the request.
  19. Turning to part 2 of the request:

"As you are aware the issue of 'antisemitism' in the Labour Party is a divisive one not only within the Party but also amongst different Jewish groups affiliated to the Party and, in particular Jewish Voice for Labour (which submitted evidence to the EHRC) has a radically different view of the issue to the Jewish Labour Movement, would you regard Jewish Voice for Labour as not part of 'the Jewish Community'?"
  20. The EHRC has maintained its position that it does not hold any information in relation to whether it views Jewish Voice for Labour as "not part of the 'Jewish Community'". It stated that the question of which organisations are or are not part of the Jewish Community was not within the scope of the investigation and the EHRC does not have a position on this.

21. Again, the Commissioner appreciates what the complainant was trying to illicit from the EHRC with this question but it is asking the EHRC to provide a view on which organisations it considers part of the Jewish Community and the EHRC has made it clear it does not have a view on this or any recorded information that sets out which organisations it does or does not consider part of the community. The request is narrow and does not allow for much interpretation and asks for a view. The Commissioner has no reason to dispute the position of the EHRC that they do not have a view on this as this is not something that is within the EHRCs remit to comment on or have an opinion on.
22. It is not the role of the Commissioner to comment on whether information should be held, only to determine if it is likely that it is held. The Commissioner cannot scrutinise the way in which the EHRC conducted its investigation or how the report was drafted and whether this was robust. The questions asked in parts 1 and 2 of the request are quite narrow and understandably the EHRC has stated it does not hold, and did not hold at the time of the request, recorded information to answer the questions. There is no obligation on the EHRC to create information or provide information that might have been created during the course of this investigation and the EHRC's attempts to confirm if information was held.
23. Therefore the Commissioner is satisfied that, on the balance of probabilities, the EHRC does not hold the information in relation to parts 1 and 2 of the request.

#### **Section 44 – statutory prohibitions on disclosure**

24. Section 44 of the FOI states that:

*"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –*

- a) is prohibited by or under any enactment,*
- b) is incompatible with any retained EU obligation, or*
- c) would constitute or be punishable as a contempt of court."*

#### **Is disclosure of the requested information prohibited by or under any enactment?**

25. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:
  - i. primary legislation (an Act of Parliament);

- ii. secondary legislation (a Statutory Instrument).
26. The Equality Act 2006<sup>1</sup> established the EHRC, merging the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission, and outlines its statutory obligations.
27. Section 20(1) of the Equality Act 2006 states:
- "(1) The Commission may investigate whether or not a person—*
- (a) has committed an unlawful act,"*
28. Section 6 of the Equality Act 2006 states:
- (1) "A person who is or was a Commissioner, an Investigating Commissioner, an employee of the Commission or a member of a committee established by the Commission commits an offence if he discloses information to which this section applies unless subsection (3) authorises the disclosure."*
  - (2) This section applies to information acquired by the Commission—*
    - (b) by way of representations made in relation to, or otherwise in the course of, an investigation under section 20.*
  - (3) This subsection authorises a disclosure made—*
    - (a) for the purpose of the exercise of a function of the Commission under any of sections 16, 20, 21, 24, 25, 31 and 32,*
    - (b) in a report of an inquiry, investigation or assessment published by the Commission,*
    - (c) in pursuance of an order of a court or tribunal,*
    - (d) with the consent of each person to whom the disclosed information relates,*
    - (e) in a manner that ensures that no person to whom the disclosed information relates can be identified,*
    - (f) for the purpose of civil or criminal proceedings to which the Commission is party, or*

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<sup>1</sup> [Equality Act 2006 \(legislation.gov.uk\)](http://legislation.gov.uk)

(g) *if the information was acquired by the Commission more than 70 years before the date of the disclosure."*

29. The EHRC has stated it *"would be prohibited from disclosing information it held in response to a Request under section 6(2)(b) EA 2006. Section 6(2)(b) of the EA 2006 provides that the Commission is prohibited from disclosing submissions made in relation to, or otherwise in the course of, an investigation made under section 20 of the EA 2006, unless disclosure is authorised by virtue of section 6(3) EA 2006."*
30. The EHRC, upon further review of the information, concluded that it could provide the information held in respect of part 6 of the request and disclosed this to the complainant during the investigation.
31. Having been provided with the remaining withheld information for parts 3, 4, 5, 7 and 8 and considering the matter, the Commissioner is satisfied that the information held for these parts had been created through the course of EHRC's investigation into the Labour Party, using the submissions and the evidence provided to it. Therefore, the Commissioner considers the exemption engaged.

**Are any of the exceptions contained in section 6(3) of the Equality Act 2006 applicable?**

32. The Commissioner concurs with the EHRC that the requested information is exempt from disclosure in accordance with section 6(1) of the Equality Act 2006.
33. The EHRC has explained it *'has discretion as to whether to use the gateways to disclose or withhold the requested information, it is not required to demonstrate that the decision not to use a gateway was reasonable.'*
34. This is in line with the Commissioner's guidance *'Section 44 prohibitions on disclosure'* which states *'If the authority has decided that information should not be disclosed under a gateway, the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable.'*<sup>2</sup>
35. Ultimately, whilst the Commissioner acknowledges the complainant's concerns, if a public authority decides that the prohibitions on disclosure is not disapplied by a gateway, the Commissioner will accept that this is

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<sup>2</sup> [Prohibitions on disclosure \(section 44\) - FOIA guidance - version 1.1 31122020 \(ico.org.uk\)](https://ico.org.uk/foia-guidance/section-44-prohibitions-on-disclosure)



the case. This position was established by the binding decision of the Upper Tribunal in *Ofcom v Gerry Morrissey* and the IC, 2011 UKUT 116 AAC.

36. The Commissioner is satisfied that section 6 of the Equality Act 2006 would prohibit disclosure and therefore the EHRC was entitled to rely on section 44 of the FOIA to withhold the information at parts 3, 4, 5 and 7 of the request.
37. Since section 44 is an absolute exemption, there is no requirement to conduct a public interest test.

## Right of appeal

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38. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**